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Supreme Court of the United States

October Term, 1962

No. 70

IRVING J. WOLF, ROBERT H. DAVIDSON, RICHARD S. HULL and FREDERICK KATZENELL,

Petitioners,

AGAINST

ARNOLD A. WEINSTEIN, JEROME FRIED, NAZARETH FAIRGROUNDS & FARMERS' MARKET, INC., et al.,

Respondents.

—o—

IN THE MATTER

OF

NAZARETH FAIRGROUNDS & FARMERS' MARKET, INC.,

Debtor

IN PROCEEDINGS FOR THE REORGANIZATION OF A CORPORATION. TWO CASES (No. 26362 AND No. 27000)

BRIEF FOR RESPONDENT ARNOLD A. WEINSTEIN ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Preliminary Statement

RESPONDENT WEINSTEIN ADOPTS RESPONDENT FRIED'S BRIEF IN NO. 27000

Weinstein adopts respondent Fried's brief in #26362 as applicable to Weinstein as an officer of the debtor.

The following material is submitted in amplification of Fried's brief and for clarity insofar as his argument applies also to Weinstein.

Question Presented

Does §249 of the Bankruptcy Act, which requires a statement to be filed by applicants for compensation showing any trading in a debtor's stock and denies compensation to those applicants who bought or sold stock during the proceeding, apply to an officer of a debtor in possession whose employment and weekly salary for services to be rendered in the operation of the debtor's business was approved and granted pursuant to §191 of the Bankruptcy Act?

Statement of the Case

Respondent Weinstein was president of Nazareth Fairgrounds & Farmers Market, Inc. before and at the time of the filing of the petition for reorganization. [R9] For the purpose of aiding the reorganization, Weinstein neither asked for nor received any salary. [R10, 17]

On May 19, 1955, acting on a petition by the debtor, the District Court approved the resolution of the debtor's Board of Directors and approved the payment of $50.00 per week to Weinstein, as president, for services to be

rendered. The District Court's approval was given pursuant to § 191 of the Bankruptcy Act. [R23]

Weinstein's duties as president may be summarized as follows: He attended at the market twice weekly during the first year or year and a half after September, 1953 for which he received no compensation. [R449] Thereafter, he went to Nazareth about once a week on the average. [R456] His work consisted of supervising and promoting the market which included establishing merchandising policies and endeavoring to build up a better type of tenancy. [R447-50], and superintending the advertising material put out by the debtor. [R456] Matters involving leases with tenants were passed on by Weinstein. [R485, 488] This statement of Weinstein's services is in general confirmed by the Court of Appeals which also noted that administration of the debtor has been successful. [R574-5]

As in Fried's case, the District Court disassociated Weinstein from management and terminated his compensation "*solely* because he had violated § 249 of the Bankruptcy Act by trading in the debtor's stock" [R249, 257; emphasis by the court] but refused to order recoupment of compensation and expenses "for good and sufficient equitable reasons". [R498]

As for petitioners' charges of misconduct by Weinstein, the Court of Appeals stated:

> "Nothing we have said is to be construed as concluding that Weinstein and Fried did breach fiduciary obligations in the transactions of which (petitioners) complain; indeed the judge's denial of 'recoupment' would indicate that he did not regard their conduct as having been very iniquitous." [R582]

Petitioners are sometimes referred to as "Wolf" or "Rehrig". Rehrig is a butcher and a tenant of the debtor who purchased stock during the course of the proceeding. [R458] He is the principal petitioner in interest. Philip is one of Rehrig's attorneys [R458] who also purchased stock of the debtor during the course of this proceeding and during the time he was an officer and director of the debtor. [Pet. Br., 8, 9; R227, 575-6, 583]

Summary of Argument

As noted above, Weinstein adopts the argument of Fried to the effect that §249 does not apply to persons receiving a salary for operating the debtor's business. Supplemental points are made as follows:

Before the provisions in §249 may be applied, the judge must fix a time of hearing to consider applications for allowances pursuant to "the necessarily cumbersome procedure of §247". [R579] A host of parties are required to receive notice of the hearing. In the case of Weinstein, more than 394 separate applications would be required, and about 485 applications in the case of Fried, before either of them could receive their weekly salaries. Each application would necessitate ascertainment of the reasonableness of the salaries and benefit to the estate. The burden of such applications on employees, and the court would be enormous. Congress could not have intended such a result.

By its very terms, §247 applies to "applications for allowances". An allowance is granted for the professional and special services already rendered by those persons mentioned in §§241, 242 and 243 who have acted in the proceedings. The granting of an allowance de-

pends upon a showing that the estate received a benefit. Weinstein was not acting in the proceedings. He was engaged in running the debtor's business. His salary therefor was fixed pursuant to §191.

Specific provision is made in §191 for the compensation of officers of a debtor in possession. The purchase of stock by an officer does not bar compensation under §191. To hold that §249 governs an officer's compensation is to render §191 mere surplusage. §249 has never been applied to the compensation of officers of a debtor in possession.

§249 does not mandate the removal of an officer who has purchased stock. The basis for removal is breach of trust. The District Court found no such breach. There is no impropriety inherent in the purchase of stock by an officer. Moreover, in this case, stock was purchased to protect the debtor against a stock raid by Rehrig whose interests are adverse to the debtor. Rehrig has admitted that if he controlled the debtor he would serve his own self-interest by giving himself a preferential lease at the expense of the debtor. Congress did not fashion §249 to disable or discourage an officer from protecting the estate against an adverse interest.

The statements in the Petition for Certiorari and in the Brief for Petitioners charging that Weinstein diverted debtor's rents to himself are false. They were known to be false by counsel for petitioners at the time they were submitted to this court. These statements should be ignored and stricken.

POINT I

§249 does not apply to the salary of an officer of a debtor in possession. Salaries of officers are governed by §191.

Weinstein relies on Fried's brief and on the analysis and reasoning in the opinion of the Court of Appeals to support the view that §249 is not applicable to the salary of an officer. In further support, the following enlargement is offered for consideration by the court:

A. The mechanics involved in the operation of §249 preclude its application to an officer who receives a weekly salary for running debtor's business.

Before the provisions of §249 may be applied, §247 requires the judge to "fix a time of hearing for the consideration of applications for allowances, of which hearing notice shall be given to the applicants, the trustee, the debtor, the creditors, stockholders, indenture trustees, the Securities and Exchange Commission, and such other persons as the judge may designate * * *." Weinstein's salary was approved in May, 1955. [R23] Over seven and a half years have elapsed since that time. This means that more than 394 separate applications to the court would have been required to be made on notice to a host of parties before the judge could come to consider whether under §249 Weinstein was entitled to receive his weekly salary. About 485 applications would have been required in Fried's case.

Congress could hardly have intended that an officer of a debtor whose weekly salary was approved under §191 would be required to make successive weekly applications to the court pursuant to the machinery set up in §247.

The burden on such officer would be too great. He would need a lawyer every week to collect his salary. In turn, the judge would be swamped with such a flood of salary applications as would seriously interfere with the normal functioning of the court. The hearings held on these applications would not be *pro forma* but would entail a review of the services being performed by the applicants to determine whether their salaries were reasonable and whether their services were of benefit to the estate. It is doubtful whether any debtor could impose the burden and expense of such court procedures on a salaried officer and expect to hold him in its employ.

B. The hearings required by §247 apply specifically to "allowances".

It is significant that the opening words of §247 refer to "applications for allowances". The allowances which are contemplated are those in the ordinary and accepted bankruptcy sense for services rendered in the court proceedings. In a Chapter 10 proceeding, an allowance may be granted pursuant to §§241, 242 and 243 to the attorney for the debtor, the referee, trustee, indenture trustees, reorganization managers and the like. The applications for allowances are made at the close of the proceeding and are considered together since the court has a limited fund to distribute which must be apportioned among the applicants entitled. *In re Prudence Bonds Corp.*, 106 F. 2nd 44, CCA 2nd, N. Y. The distinction between an allowance and salary is clear. There is an application under §249 for an allowance for "services (already) rendered". There is an application under §191 for approval of weekly salary payments to be made to an officer for services to be rendered.

The granting of an allowance involves a determination that the services rendered were of benefit to the estate. *Dickinson v. Cowan*, (1940) 309 U. S. 382. No such determination was required in the case of Weinstein as an officer. He was engaged in running debtor's business [R447-51] and his weekly salary therefor was approved by an order made pursuant to §191.

C. §191 specifically provides for the compensation of officers of a debtor in possession.

The pertinent portion of the section reads:

> "A trustee or debtor in possession may employ officers of the debtor at rates of compensation to be approved by the court. * * * *"

This specific provision in §191 makes it abundantly clear that §249 does not govern here. If §249 governed the compensation of officers, §191 would be mere surplusage. "The employment and compensation of officers of the debtor are controlled by §191." 6 Collier on Bankruptcy (14th Ed.) ¶13.04 (2). The compensation to Weinstein was fixed pursuant to §191 [R23]. There is no claim that the order approving Weinstein's salary was obtained by any fraudulent act or concealment or that the District Court mistakenly granted the order.

It is the salary paid for Weinstein's services in the operation of debtor's business which petitioners seek to terminate and recoup because of stock trading which bars compensation under §249. However, §191, which controls the compensation of officers, contains no provision barring compensation to an officer who has purchased stock. Such a purchase invites the scrutiny of the court. Where it is shown that an officer has purchased a debtor's paper for

less than fair or face value his claim therefor will be limited to the actual consideration paid (cf. *In re Los Angeles Lumber Products Co.*, 46 F. S. 77, where a director sought allowance of $252,500 face value of debtor's bonds for which he paid $69,999.84 and the court limited the claim to the director's cost).

§249 has never been applied to the employment and compensation of an officer of a debtor. No case to such effect has been cited by the petitioners or by the District Court below.

POINT II

Neither §249 nor any other section of the Bankruptcy Act mandates the removal of an officer of a debtor for having purchased stock. Such removal may only be based on breach of trust which is absent here.

The order removing Weinstein from participation in debtor's affairs was based *solely* on the claimed violation of §249. [R257; italics by the District Court]

Petitioners have conceded that there is no provision in the Bankruptcy Act which requires the removal of an officer because of trading in the stock of a debtor. [R443] In this context, the only possible justification for removing Weinstein from participation in the debtor's affairs would be conduct amounting to a breach of trust.

It must be stressed that there was no bad faith or breach of trust on the part of Weinstein or Fried. This is confirmed by the District Court which stated that "* * * for good and sufficient equitable reasons they (Weinstein and Fried) will not be compelled to reimburse either compensation or expenses." [R498] There could

be no equities of any kind running in favor of Weinstein if he had been guilty of bad faith or breach of trust. The Court of Appeals took pains to point out that there was no breach of trust by Weinstein. [R582]

Despite the hard words in petitioners' brief, the purchase of stock by an officer is not the signal for calling out the *posse comitatus*. There is no impropriety inherent in such a purchase and it does not involve reflection on personal integrity. *Finn* v. *Childs*, 181 F. 2nd 431, 441; *In re Republic Gas Corporation*, 35 F. Supp. 300, 306. Thus, the vilification of Weinstein in petitioners' brief is wholly indefensible.

In the footnote to Fried's brief on page 25, attention is called to the insincerity of petitioners' attack on Weinstein's and Fried's stock purchases because petitioners themselves raided the debtor's stock. More than insincerity is involved. The protection of the debtor was in issue. The stock raid by Rehrig does not even have the color of a legitimate business investment. The purchase of stock about which petitioners complain was made solely to protect the debtor from control by an adverse interest in the person of Rehrig who was seeking a preferential lease from the debtor with a monopoly in the active meat business at the market. These are the facts:

Rehrig is a butcher and one of debtor's tenants. The sale of meat is one of the most active businesses at the market. [R469] Rehrig wants a preferential lease at the market. All he was willing to pay for his space was $8,000 [R296] despite offers from others of $10,000 and $15,000. [R461] He wants a mopopoly in the sale of meats [R444] which is not in line with the policy of the debtor and is not in its best interests. [R444, 469] He has embarked on a raid of the debtor's stock to gain control

over it for these private purposes. [R296, 444-5, 459-60] It was over Rehrig's strenuous opposition that Weinstein and Fried succeeded in closing a lease with him so that his rental was raised from $6,000 to $15,000 annually. [R458-62]

If Rehrig were in control of the debtor he would serve his own self-interest and the devil take the debtor. Rehrig says so himself: [R445]

> "Q. You just told Mr. Margolis, didn't you, that you felt that $10,000 was plenty for the space that you now occupy? Didn't you say that? A. Yes, sir.
>
> Q. And if you could use that voice on behalf of the Debtor, you would not ask or try to get for yourself any $15,000, would you? A. Not for that spot, no, sir.
>
> Q. In other words, you would prevent that in so far as you were concerned; you would serve your own self-interest, pay only $10,000 despite the fact that you might get $15,000 on behalf of the debtor. Isn't that right? A. Yes, sir."

Weinstein purchased stock for the purpose of preventing Rehrig from getting control and saddling the debtor with the consequences of his self-interest and this was Weinstein's only purpose and reason. [R462-3] There was no solicitation of any stock. [R463] There was no profit or thought of profit by Weinstein. It was only after Rehrig approached stockholders to buy their stock that Weinstein appeared in the picture and in each of those situations Weinstein advised against any sale even to himself. [R303-4, 463]

In the variety of charges made by petitioners, nowhere is it claimed that Weinstein made a single cent of profit

out of the purchase of stock. It is clear that stock was purchased solely to protect the debtor from a stock raid by an interest openly adverse to the debtor in the person of Rehrig. This is the stark and simple fact which emerges from the record.

Rehrig is a butcher and a tenant of the debtor. Wolf is his agent. Wolf is brazenly asking the court to punish Weinstein by way of removal and recoupment of salary for trying to stop his butcher from plucking the debtor. Congress did not fashion §249 to disable or discourage an officer of a debtor from preserving the estate. Such a construction would be a perversion of the statute.

POINT III

The statements by petitioners that Weinstein diverted debtor's rents to himself are false and scandalous. Such statements should be ignored and stricken by the court.

Respondent Arnold A. Weinstein is a member of the Bar of this court.

As a ground for their Petition for Certiorari in #23632, petitioners charged Weinstein with "diversions of debtor's rents to (himself) during the proceedings". [Petition, p. 3] The same charge appears on pages 3 and 50 of the Brief for Petitioners. At the hearings below, counsel for petitioners, stated in open court that he charged Weinstein with grand larceny respecting the so-called rent diversions. [R446]

The foregoing statements are false and counsel for petitioners knew they were false at the time he made them in the Petition for Certiorari and in petitioners' brief. The court is respectfully advised that:

1. the petition for removal [R217-24] does not allege that Weinstein diverted any of debtor's rents to himself;

2. Counsel for petitioners testified at the hearings below and admitted that he had no proof and could produce no evidence indicating that Weinstein received anything with respect to the so-called rent diversions. [R446-7]

Such misstatements contribute nothing to a proper disposition of this appeal. The criminal atmosphere knowingly sought to be created where none in fact exists can only serve to mislead the court. It is of no help to find a grudging admission buried at page 165 of petitioners' 228 page brief to the effect that Weinstein received no part of the alleged diversions. The least the court is entitled to is a fair statement of the facts and this at the very outset.

Of course, it is not known to Weinstein whether the enormity of the grand larceny charge of diverting debtor's assets to himself made against him, an attorney and an officer of the debtor, was instrumental in the original grant of certiorari. It is now urged that the misstatements play no part in the deliberations of the court on the appeal. Such misstatements indicate counsel's lack of confidence in his position and lead to the conclusion that all of his statements respecting the facts as well as the law are not to be taken without verification.* *Falsus in uno, falsus in omnibus.*

The misstatements should be stricken and ignored.

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* Indeed, counsel's resort in his brief to unbridled name calling is by itself enough to arouse suspicion.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Dated: New York, N. Y.,
January 15, 1963.

Respectfully submitted,

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